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No. 1117

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

J. H. KASISHKE, CORALENA OIL COMPANY, a Delaware Corporation, and OLIVE DRILLING COMPANY, an Oklahoma Corporation,

Petitioners,

vs.

B. A. BAKER,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

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STATUTES

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioners, A. H. Kasishke, Coralena Oil Company, a Delaware corporation, and Olive Drilling Company, an Oklahoma corporation, respectfully pray that a Writ of Certiorari issue to review the decision and judgment in the United States Circuit Court of Appeals for the Tenth Circuit entered December 18, 1944, affirming the judgment of the District Court of the United States for the Northern District of Oklahoma, entered May 13, 1944, adjudging

that B. A. Baker, respondent, recover of petitioners, an undivided one-tenth interest in all leases, leasehold interests and leasehold estates acquired by petitioners through June 5, 1939, directing petitioners to convey such undivided interest to respondent, and decreeing an accounting for the purpose of determining the amount to be recovered by respondent under the judgment.

The Opinions Below

The District Court of the United States for the Northern District of Oklahoma filed no opinion. Its findings of fact and conclusions of law appear in the record at pages 59 through 70.

The opinion of the United States Circuit Court of Appeals (R. 333-338) was entered on December 18, 1944, and is reported in 146 F. 2d 113.

Jurisdiction

The opinion and decision of the United States Circuit Court of Appeals was entered on December 18, 1944 (R. 333-338). A Petition for Rehearing was timely filed on January 15, 1945 (R. 343, 340). This Petition for Rehearing was considered and denied by the United States Circuit Court of Appeals on January 29, 1945 (R. 361). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925.

Summary Statement

This case presents for correction errors of the District Court of the United States for the Northern District of Oklahoma, erroneously affirmed by the United States Circuit Court of Appeals and involves a flat refusal by the courts below to follow the controlling statutes and decisions of Oklahoma. The case is one of great importance to the

entire oil and gas industry in the Tenth Circuit and may have important effects in that industry outside of the Tenth Circuit because of the far reaching effects of the decisions below.

The oil industry is the largest single business carried on in Oklahoma and Kansas, and has lately become probably the leading industry of New Mexico. All three of these States are in the Tenth Circuit.

We say the decisions below were rendered in utter disregard of both the statutory and case law of Oklahoma controlling the alleged cause of action asserted by the respondent Baker.

The action here involved is one involving a *joint adventure* based upon an *oral* contract to recover a one-tenth interest in numerous producing oil and gas properties owned by the respondent corporations, as well as the profits earned by such interest. The properties involved, exclusive of profits earned in the past, of petitioner, Coralena Oil Company, alone, are valued at Six Million Dollars (R. 63).

Joint adventures have been numerous in the oil industry, and have been the subject of many actions at law and in equity in the courts of Oklahoma over many years. Out of these numerous controversies, by the year 1937, the law of Oklahoma had become crystallized into a set of basic principles which the Supreme Court of Oklahoma, in that year, adopted as controlling all litigation thereafter arising in that State pertaining to joint adventures, particularly in the oil industry. Because of the vast amount of litigation that had arisen concerning joint ventures and partnerships in Oklahoma, the legislature had passed certain limiting statutes which will be hereafter discussed, controlling the application of the law to partnerships and joint adventures doing business in Oklahoma. Moreover, the Supreme Court of Oklahoma has taken the positive stand that it is a legal

impossibility for a majority stockholder by virtue of his stock ownership to gain legal control over a corporation. The Supreme Court of Oklahoma has also held that agreements for the conveyance of an interest in mineral leasehold estates in Oklahoma are within the statute of frauds and to be enforced must be in writing.

We will demonstrate hereinafter that the District Court and the Court of Appeals below refused to follow the law of Oklahoma as laid down in the statutes of Oklahoma and by the decisions of the highest Court of the State of Oklahoma controlling this case in flagrant violation of the rule laid down by this Court in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, and the cases following it.

In 1929, A. H. Kasishke, Incorporated, an Oklahoma corporation, was engaged in the rig building and lumber business. Respondent was a stockholder, Secretary-Treasurer and a member of the Board of Directors of that corporation. The corporate records, prepared by respondent, disclosed that in consideration of the performance of personal services on respondent's part, he received from the corporation a certain salary and a 10% bonus from the profits of the company (R. 139-141). Petitioner, A. H. Kasishke, was the President of that corporation and the owner of one-half of its capital stock, and Olive Kasishke, his wife, was the owner of the other half of the stock, with respondent Baker holding a qualifying share. In 1932 it was decided that A. H. Kasishke, Inc., would go out of the rig building business and thereafter engage in the general oil business.

In 1932, the corporate records disclose that respondent was employed by the corporation at a stated salary. There is nothing in the record of that corporation which shows or even indicates that the respondent was to receive any interest in the profits earned by the corporation after it engaged in the oil business. Respondent remained Secre-

tary-Treasurer of the corporation, continued to hold his qualifying share of stock and continued as a member of the Board of Directors. Respondent prepared all minutes and resolutions reflecting the arrangements between the corporation and respondent.

Petitioner, A. H. Kasishke, advanced $300,000 to the corporation to enable it to engage in the general oil business. Respondent advanced no capital for the new venture. At the time the corporation went into the oil business, it owned no producing oil and gas leases.

Thereafter, the corporation known as A. H. Kasishke, Inc., was dissolved and the Coralena Oil Company of Oklahoma was formed. Later, this corporation became the Coralena Oil Company of Delaware. Subsequently, the Olive Drilling Company, an Oklahoma corporation, was organized. Respondent was issued a qualifying share or shares of stock in each of these corporations and served as Secretary-Treasurer and as a member of the Board of Directors of each of them.

From year to year, resolutions of the various Boards of Directors of the respective corporations, in clear and no uncertain terms, stated the exact salary and compensation which respondent should receive in payment of the services he rendered these corporations. Such records were prepared by respondent.

A. H. Kasishke, Inc., and the various corporations subsequently organized, acquired many oil and gas leases in Oklahoma and Kansas proving to be of enormous value. Thus, the District Court found that the leases of petitioner, Coralena Oil Company, alone were worth Six Million Dollars (R. 63). During the years of the development of the oil properties, from 1932 to 1939, respondent worked as an employee of the various corporations, and in each instant at a stated salary. Such records during all these years were

prepared by or under the direction of respondent. In 1939, a controversy arose between petitioner, Kasishke, and respondent, Baker. In June of 1939, respondent Baker was then employed by the Olive Drilling Company at a stated salary and was Secretary-Treasurer of that corporation. As a result of the controversy between petitioner, Kasishke, and respondent Baker, Baker voluntarily resigned his position with petitioner, Olive Drilling Company. This resignation is contained in a letter dated June 5th, 1939 (R. 33). The letter gives as a reason for the resignation, the attitude of the petitioner, Kasishke. The letter asserts no claim of any character whatsoever against any of petitioners, asserts no breach against Kasishke and is consistent only with the resignation of an *employee* from his job.[1]

From June 5, 1939, when respondent resigned, until May 26, 1942, respondent asserted no claim orally or in writing against petitioners of any kind or character, or for any interest in any of the producing properties of petitioner corporations.

On May 26, 1942, respondent filed this action in the District Court for the Northern District of Oklahoma, claiming that in the year 1932 he had an oral contract with petitioner, Kasishke, *individually*, wherein it was agreed that respondent should have an undivided one-tenth interest in all leases obtained by the corporation, A. H. Kasishke, Inc., after petitioner, Kasishke, had been paid back the money he had advanced and after the properties had been fully paid out. In support of this allegation, respondent's entire testimony was as follows (R. 98, 99, 116):

> "A. Well, up to that time I had been getting ten per cent of the profits of the rig building business to be

[1] The only claim respondent asserted against any of petitioners, after his resignation and prior to this action was *for three days pay* (R. 65).

computed at the end of the year, and we started into the venture of oil business, and during the conversation in the fall of 1932 with Mr. Kasishke he brought up the question of turning the rig building business over to the Dean Rig Construction Company. We were in the process of drilling a well and making some other deals, and during this conversation he said, now if we should turn that over to the Dean Rig Construction Company he said your deal is going to be different, it will have to be different, in that if we got into the oil business and you devote your time to the oil business, look after the office and general routine of work, and with your experience, you will have to wait until I get my money back and the properties pay out before you can share in anything, and he says you will get one-tenth; you cannot get it until the properties pay out; and I said, that is all right, Al, I am not worried about that.

Q. No distinct difference, no change was made anyhow in any other respect from the contract that you had about the profits?

A. Mr. Kasishke told me, you understand if you go into this oil business it will have to be different so far as you are concerned. I had been drawing ten per cent of the profits of the rig business, but in that we are going into the oil business it was going to be necessary for him to place money in there to develop and drill these wells, if and when we drilled them, and he said, you understand you cannot expect to draw any profits, you cannot expect to draw anything until the properties are paid out and I have got my money out of them, then you share in a ten per cent interest. That was about the substance of the conversation.

Q. How did that come up, if you remember?

A. I don't remember just how it came up other than Al was sitting on a divan, in fact lying down; he just raised up and said, you understand our deal; I said, yes, I thought I did; he said, you understand you don't get anything out of this until I get my money out of this and the properties pay out, and I said, yes; and he said, that is all I want to know, I just want to know you

understood it. That was around the first of December."

Respondent did not contend that the properties had paid out on June 5, 1939, the date of his resignation, but did contend that they had paid out at the time he filed his action in 1942. Respondent further contended that the conversation had between him and petitioner, Kasishke, created a joint adventure which entitled respondent to participation in the profits earned by a one-tenth undivided interest subsequent to June 5, 1939, the day when respondent admitted and the District Court found (R. 70) that the joint adventure was terminated.

As this so-called joint adventure had no term, it was terminable at the will of either party and no excuse or justification for termination was needed by either party to terminate the venture.

Respondent also contented that petitioner corporations were simply convenient devices by which petitioner, Kasishke, carried on his business, and since the corporations were controlled and dominated by petitioner, Kasishke, the corporate entities should be disregarded.

Petitioners defended on the ground that the oral contract sued upon was never in fact created; that respondent was an employee of the various corporations, working for a stated salary; that these facts were reflected by minutes and resolutions of the Boards of Directors of the petitioner corporations, which records were prepared by respondent as Secretary-Treasurer of each corporation; that respondent, being a stockholder, officer and director of petitioner corporations, was estopped to contend that they did not in fact exist and that their corporate entities should be disregarded, and was further estopped to contend that the business of the various corporations was carried on as a joint adventure; and that even if the alleged conversation between respond-

ent and petitioner, Kasishke, had occurred, it was wholly insufficient *as a matter of law* to establish a joint adventure, and under no theory of law could be used as a basis to support the relief sought by respondent. Further, petitioners contended that the conditions that the properties be paid out and that petitioner, Kasishke, be repaid the money he invested in the oil enterprises, were conditions precedent to the vesting of any interest in respondent, even under respondent's theory of the case. Hence, as respondent failed to prove the fulfillment of such conditions, he was not entitled to recover; that respondent as a matter of law was not entitled to participate in the profits of an alleged joint adventure or partnership after his withdrawal from the arrangement; that the respondent renounced and repudiated the alleged oral contract before the time of performance and therefore performance on petitioner's part was excused; that all obligations remaining to be performed by petitioners on June 5, 1939, when respondent withdrew and resigned, were executory obligations which were extinguished by respondent's renunciation and repudiation of the alleged oral agreement. Petitioners further contended that the alleged oral express contract was void and unenforceable under the Oklahoma statutes of uses trusts and frauds. Petitioners contended that the theory that control of the corporations here involved was obtained through majority stock ownership and personal persuasion is untenable and legally impossible under Oklahoma law.

The District Court disregarded the controlling Oklahoma statutes and decisions of Oklahoma's highest court, and held that an express oral contract existed between respondent and petitioner, Kasishke, and that the petitioner corporations were bound thereby as Kasishke controlled the corporations, which control the District Court held (R. 56) flowed from Kasishke's ownership of a majority of the

shares of stock of petitioner corporations; that the oral contract established a joint adventure under which respondent was entitled to a one-tenth interest in all properties owned by petitioner corporations on June 5, 1939, the date when respondent resigned; that the petitioner should execute assignments conveying to respondent an undivided one-tenth interest in all leasehold estates owned by the petitioner corporations on June 5, 1939, and finally, that respondent was entitled to participate in the profits of the alleged joint adventure *after its termination on June 5, 1939*, and this although the properties involved had not paid out (R. 66). From this judgment of the District Court, petitioners appealed (R. 85). The Circuit Court of Appeals for the Tenth Circuit affirmed (R. 339).

Questions Presented

1. Whether the decisions below have decided important questions of local law in a way probably in conflict with the applicable local law and decisions.

2. Whether the decisions below have not given proper effect to applicable decisions of this Court.

3. Whether under the Oklahoma statutes and decisions, respondent failed to prove a cause of action.

4. Whether respondent is estopped to assert that the alleged oral agreement created a joint adventure.

5. Whether the amended complaint alleges and the proof thereunder of the alleged conversation relied upon by the petitioner establishes, as a matter of Oklahoma law, a joint adventure.

6. Whether respondent can recover under the Oklahoma decisions upon the theory that he had an employment contract with petitioner corporations because of the oral conversations had with petitioner, Kasishke.

7. Whether this is a case under the Oklahoma decisions where the corporate entity may be disregarded.

8. Whether the alleged oral contract is enforceable because of the Oklahoma statute of uses and trusts and the Oklahoma statute of frauds.

9. Whether the evidence was sufficient to support the holdings of the courts below that the legal titles to the leases involved were held in trust by the corporations for the benefit of respondent.

10. Whether the findings of fact adopted by the court are sufficient to support the judgment and decree entered.

11. Whether the conclusions of law made by the District Court and affirmed by the Court of Appeals, are not in conflict with the applicable local statutes and decisions of Oklahoma.

Specification of Errors to Be Urged

1. In denying petitioners' Motions to Dismiss the cause.

2. In holding that the respondent alleged and proved a cause of action.

3. In holding that the respondent was not estopped to assert that the alleged oral agreement involved created a joint venture.

4. In holding that the oral contract relied upon as a matter of law created a joint adventure.

5. In holding that the petitioner corporations were bound by the oral contract allegedly made between petitioner, Kasishke, and respondent.

6. In holding that this was a case under the Oklahoma decisions where the corporate entity might be disregarded.

7. In holding that the oral contract sued upon was sufficient to support the sweeping provisions of the judgment and decree entered.

8. In failing to hold that the oral contract was unenforceable because of the Oklahoma statute of uses and trusts and the Oklahoma statute of frauds.

9. In holding that the evidence was sufficient to support the decision that the legal titles to the leases involved were held in trust by petitioner corporations for the benefit of respondent.

10. In holding the findings of fact were supported by the weight of the evidence and that such findings supported the judgment and decree entered.

11. In making conclusions of law in conflict with applicable local statutes and decisions.

12. In entering judgment for respondent.

Statutes Involved

Section 8116, Oklahoma Compiled Statutes 1921, provides:

> "After a partner has given notice of his renunciation of the partnership, he cannot claim any of its subsequent profits, and his co-partners may proceed to dissolve the partnership."

Section 136, Title 60, Oklahoma Statutes 1941, provides:

> "No trust in relation to real property is valid unless created or declared:
>
> I. By written instrument subscribed by the grantor, or by his agent thereto authorized by writing;
>
> II. By the instrument under which the trustee claims the estate affected; or,
>
> III. By operation of law."

Section 137, Title 60, Oklahoma Statutes 1941, provides:

> "Trusts Presumed, When. When a transfer of real property is made to one person, and the consideration

therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made."

Section 136, Title 15, Oklahoma Statutes 1941, provides:

"The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent:

* * * * * * *

5. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged."

Reasons for Granting the Writ

Several of the reasons usually advanced for the allowance of a Writ of Certiorari are present in this case. The Circuit Court of Appeals has rendered a decision on important questions of local law in a way probably in conflict with the applicable local statutes and decisions, has not given proper effect to the applicable decisions of this Court, and the questions presented are of such importance that the public interest calls for the exercise of this Court's powers of supervision and correction.

I

Both the District Court and the Circuit Court of Appeals Have Decided Important Questions of Local Law in a Way Probably in Conflict With the Applicable Local Statutes and Decisions.

As we have shown in the Summary Statement, it is of first importance to the many persons, companies and corporations engaged in development and exploitation in the oil

and gas industry in such States as Oklahoma, Kansas and New Mexico, that the rules of law governing partnerships and joint adventures be clear, concise and definite. Practically all newly discovered producing areas in these three States were discovered by persons who were acting as mining partners or as joint adventurers. Of the larger oil fields in Oklahoma, only a few have been discovered by large oil companies.

The State of Oklahoma has found it necessary to make clear and concise rules controlling joint adventures and such rules must be kept clear and concise in order to encourage the development and exploitation of oil in the industry, as we all know that it is of the utmost importance to the Nation to discover new oil reserves because of the great strain that has been placed upon producing oil fields and on our established oil reserves by the tremendous demands of the present global war. Conflict between the State decisions of the Federal courts in these States upon the important questions controlling the operations of partnerships and joint adventures in the oil and gas production field will cause hopeless confusion and a multiplicity of litigation.

We will now demonstrate that the decisions below are in conflict with the applicable statutes and decisions of Oklahoma, and in effect let down the bars to all sorts of suits drawn on the "joint adventure" theory in the Federal courts of Oklahoma, and the Tenth Circuit, which could not be maintained if brought in the Oklahoma State Courts.

(A) A Joint Adventure Was Not Established Because There Was No Argeement Between the Parties to Share Losses

Many decisions have been had over the years in Oklahoma, dealing with partnerships and joint adventures in the oil

industry. In 1937, the Supreme Court of Oklahoma did what it had not done in any of its prior decisions controlling partnerships or joint adventures, in promulgating a positive definition containing the essentials which must always be present before a joint adventure can exist in Oklahoma.

In the case of *White* v. *A. C. Houston Lumber Co.*, 179 Okl. 89, 64 P. (2d) 908, 910, the Supreme Court had before it for decision the question of what were the essentials of a joint adventure in Oklahoma. The Supreme Court of Oklahoma reviewed the numerous decisions of that court dealing with this subject, and then enunciated the following rule controlling joint adventures (p. 910):

> "Each case of mining partnership or joint adventure must necessarily be determined by its own facts. However, by examination of cases heretofore decided by this court, *we can devise a test consisting of three requirements which must always be present in order to form the relationship;* (1) There must be joint interest in the property by the parties sought to be held as partners; (2) *there must be agreements,* express or implied, *to share* in the profits *and losses* of the venture and (3) there must be actions and conduct showing co-operation in the project." (Citing fifteen Oklahomas decisions.) (Italics supplied)

Since the decision of the Supreme Court in the *White* case, all cases in the Supreme Court of Oklahoma concerning joint adventures and partnerships have followed the rule of the *White* case. The latest case, *Conley Drilling Co.* v. *Rogers*, 191 Okl. 667, 132 P. (2d) 959, 961, was decided by the Supreme Court of Oklahoma in 1943. The *Conley Drilling Co.* case squarely holds that it is essential to the existence of a joint adventure that the parties agree to share losses. The rule of the court on this question is stated con-

cisely in the third paragraph of the syllabus of the case, which reads (p. 959):

> "Generally before a mining partnership can exist, there *must be a joint interest* in the property, *an agreement* express or implied to develop it, *and to share in the profits and losses* incident to the venture, and conduct showing a cooperation between the parties in the venture." (Italics supplied)

Measured by the rule of the *White* and *Conley Drilling Co.* cases, the Amended Complaint fails to state a cause of action for the reason that it fails to allege any agreement between Baker and Kasishke to the effect that Baker should share the losses of the venture. For this reason, it was error for the District Court to overrule petitioner's Motion to Dismiss the Amended Complaint. In testifying on this vital aspect of the case, Baker said that it was agreed that he was *not* to share in any losses of the venture (R. 145). Thus, the proof likewise failed to show a cause of action and establish a joint venture under the rule announced in the *White* and *Conley Drilling Co.* cases. It is submitted that the decisions below are in direct conflict with the law of Oklahoma as laid down in the *White* and *Conley Drilling Co.* cases. The decision below pays "lip service" to the rule that joint adventurers must agree to share losses (R. 337), but then holds that it is not absolutely necessary that there be participation in both profits and losses, citing (R. 337) *E. D. Bedwell Coal Co. v. State Ind. Comm.* (Okl.), 11 P. (2d) 527. We say that the rulings in the *White* and *Conley Drilling Co.* cases have definitely established as the controlling Oklahoma law that there *must* be an agreement to share *both* profits *and losses*, and therefore these later decisions clearly supercede the *E. D. Bedwell Coal Co.* case.

Here the record is clear and there is no conflict because no agreement to share losses was alleged by respondent and he testified as follows (R. 145):

"Q. You were not to take a dime of loss, is that true? A. That is true."

Hence it is specious to argue as the court does below (R. 337) that an agreement to share losses might be implied because Baker worked for a "nominal"[2] salary.

(B) Respondent Had No Joint Interest in the Properties or in the Profits of the Enteprise and his Interest Was Contingent, Therefore No Joint Adventure Was Established

The case of *White* v. *A. C. Houston Lumber Co.*, supra, holds among the requisites required for a joint venture, that there must be a joint interest in the property involved and necessarily in the profits of the venture. The pleadings, the proof, the findings of the District Court and the judgment of that court all show plainly that it was respondent's theory that he was to have no interest in the physical properties described, or in the profits earned, until and unless Kasishke was repaid the money he had advanced, and until the properties were substantially drilled, developed and fully paid out. This theory necessarily means that respondent had no joint interest in the property except upon the happening of these contingencies. In such a situation, we submit the case of *Carson* v. *Waller*, 127 Okl. 186, 260 Pac. 72, is controlling. There, the Supreme Court of Oklahoma had before it for consideration the provisions of a contract which it was urged created a min-

[2] Such "nominal" salary when Baker resigned was $300 per month (R. 136)!

ing partnership or joint adventure because the contract provided as follows:

> "Should said well become a commercial well, it is agreed that party of the second part shall pay his proportionate one-fourth part of the further development and operating expenses of said lease, and if casing is set in said well he shall pay his proportionate one-fourth part of the expenses of such casing; all future development or operating expenses to be determined by a majority of the interests owned and held in said leasehold estate; all oil and gas runs accruing to the interest of the party of the second part shall be by appropriate division order assigned to parties of the first part for an indebtedness remaining unpaid at any time chargeable to the interest of the party of the second part."

In construing the provisions of the contract in the *Carson* case, which are substantially to the same effect as the provisions of the alleged oral understanding in the instant case, the Supreme Court of Oklahoma held:

> "It is contended that this paragraph of the contract is sufficient, in itself, to create a partnership between the parties thereto. This contention has been decided adversely to the claim of the plaintiffs, by this court, in the following cases: *Gillespie* v. *Shufflin*, 91 Okl. 72, 216 P. 132; *Wammack, et al.*, v. *Jones*, 103 Okl. 1, 229 P. 159; *Ellis, et al.*, v. *Lewis, et al.*, 119 Okl. 201, 249 P. 295; *Ash* v. *Mickleson*, 118 Okl. 163, 247 P. 680.

In the last-cited case, the court holds as follows:

> 'A mining partnership or a joint adventure cannot exist, unless there is a co-operation among the parties in the development of a lease for oil and gas, each agreeing to pay his part of the expenses and to share in the profits and losses. * * *
> "Where it is the intention of the parties that a partnership is to become effective *upon the happening of a certain contingency*, or is to take effect at *a fu-*

ture date, the relation of partners does *not* exist.' (Italics supplied.)

The *Carson* case has been cited with approval by the Supreme Court of Oklahoma on numerous occasions since it was written in 1937. It is plain under respondent's theory that, if the properties here involved did not produce sufficient oil to pay out, and if the properties did not produce sufficiently to pay Kasishke for the amounts advanced by him, and if the properties were not substantially developed because of any justifiable reason, Baker, under his alleged agreement obtained no interest in the physical properties and no interest in the profits. Therefore, Baker never became a joint adventurer.

The decisions below clearly conflict with the rule of the *Carson* case and the cases cited therein.

(C) Respondent Failed to Establish a Joint Adventure Because the Evidence Showed That He Had no Equal Right of Management

It was respondent's contention that all of the properties from which any profits could possibly be derived or were to be derived were to be owned and managed by a corporation in which respondent was to own one share of stock and in which he was to be an officer and director.

A. H. Kasishke, Inc., the original corporate entity through which the respondent says the joint adventure was to be operated, was organized under the laws of the State of Oklahoma. Section 104, Title 18, Oklahoma Statutes, 1941, provides that the corporate powers, business and property of all corporations formed under the chapter must be exercised, conducted and controlled by a Board of Directors.

Under the very agreement upon which respondent relies, he had no right to manage or control the property or business of the corporate enterprises. That seems plain.

It has long been settled law in Oklahoma, that the right of management should be used as a test for distinguishing between joint adventures and other employment contracts and relationships. Thus, in the case of *Municipal Paving Co.* v. *Herring*, 50 Okl. 470, 150 Pac. 1067, 1070, the question was presented whether a written contract constituted a partnership (or joint adventure) or an employment contract. The Supreme Court of Oklahoma in the course of its opinion commented at length upon the fact that the written contract showed that the plaintiff there involved had no voice in the management of the business, and held (p. 1070):

> "The plaintiff, under the terms of the contract, had no voice in the management of the business, except in a minor capacity at the mines, and this even was under the direction of the company. The contract did not give him the right to bind the company or the property as a member of a partnership may bind the firm and the firm property.
>
> * * * * * * *
>
> So the contract, measured by every test, falls short in each instance of fulfilling the requirements of a partnership agreement."

Other decisions throughout the United States have followed the rule of the *Municipal Paving Co.* case.[3]

Under this point, it is also important to note that the respondent had no *joint* interest in the profits. Even under his theory of the case his future interest at best was but a common interest in such profits and he had no disposition and control over such profits. The *Municipal Paving*

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[3] *DeRees* v. *Costaguta*, 275 Fed. 172; *First National Bank of Eugene* v. *Williams* (Ore.) 20 P. 2d 222; *Hanthorn* v. *Quinn*, 42 Ore. 1, 69 P. 817; *Cong* v. *Toy*, 85 Ore. 209, 166 P. 50; *Worden Co.*, v. *Beals and Bennet*, 120 Ore. 66, 250 P. 375; *Beck* v. *Cagle* (Cal.) 115 P. 2d 613; *Coral Gables Surety Corp.* (Fla.) 166 So. 555; *Rae* v. *Cameron* (Mont.) 114 P. 2d 1060; *Dameron* v. *Zilch* (R. I.) 186 Atl. 21; *Spier* v. *Lang* (Cal.) 53 P. 2d 13

Co. case, supra, held that in a situation as that involved in the case at bar, a partnership or joint adventure does not arise. Thus, the Supreme Court held in the *Municipal Paving Co.* case (p. 1070):

> "If the interest in the profits is joint, then that generally makes it a partnership, but a common interest in the profit does not. If the interest in the profits is that of an owner, if there be a joint seizure, if the parties each have the right, as such owners, to dispose of the profits, then there is a partnership. If one may dispose of or control the profits as much as the other, then there is a joint interest, but if the plaintiff's interest be only a common interest in the profits, that is, if he have no title jointly with the company with the right to control as owner over the profits, but with only a common interest in them because the profits measure what amount he shall receive from the asphalt taken from his mine, then he is not a partner. *Sankey* v. *Iron Works*, 44 Ga. 228. The contract itself does not say that the plaintiff shall share in the losses, and from an examination of the same it is manifest that the plaintiff had no seizure of its profits, and had no more control thereof than a stranger to the contract. The defendant company retained absolute control and possession over the entire business, the plaintiff had no legal or equitable right in the profits as profits, but only a contractual right to have his share paid over to him by the company, when earned, and we think in this contract the company simply contracted to pay the plaintiff a certain part of the profits, if any were made, as payment for the asphalt mined from plaintiff's lease. That this conclusion is true is apparent from the fact that no other provision was made in the contract for remunerating the plaintiff for the asphalt other than his sharing in the profits."

It is important in construing this rule to bear in mind the first and third provisions of the rule announced by the Supreme Court of Oklahoma in *White* v. *A. C. Houston*

Lumber Co., supra,[4] which provisions of the rule must be present before a joint adventure can be decreed. It is readily seen that these requisites of joint interest and cooperation in the project were absent in both allegations and proof in the present case; hence, under the Oklahoma decisions it was erroneous for the courts below to hold a joint venture had been established.

(D) A Joint Adventure Must be Limited to a Specific Venture

The respondent, even under his theory of the case, would have only a contract under which he might become a joint adventurer upon the happenings of certain contingencies which never occurred. It was respondent's theory that he entered into an agreement with petitioner, Kasishke, under the terms of which they engaged in a general oil business and this is the broad and unlimited nature of the alleged agreement found by the District Court (R. 61). This agreement was not for the purpose of developing any specific or particular property, or for engaging in any single enterprise, but was a broad arrangement to engage in the general oil business in all of its aspects.

The Supreme Court of Oklahoma has held many times that a joint adventure is a special combination of two or more persons seeking jointly, without any actual partnership *or corporate designation,*[5] a profit in some specific venture.

Smith v. *Burke,* 150 Okl. 34, 300 Pac. 748.

Twyford v. *Sonken-Galamba Corporation,* 177 Okl. 486, 60 P. (2d) 1050.

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[4] 179 Okl. 89, 64 P. (2d) 908, 910. The first requirement of the rule is that there must be joint ownership in the property by the parties and the third requirement is that there must be actions and conduct showing cooperation in the project.

[5] As respondent conceded that the "venture" was to be conducted *as a corporation,* it could not be a joint adventure.

Coryell v. *Marrs*, 180 Okl. 394, 70 P. (2d) 478.
Commercial Lumber Co. v. *Nelson*, 181 Okl. 122, 72 P. (2d) 829.
Sand Springs Home v. *Dail*, 187 Okl. 431, 103 Pac. 524.

Certainly, the oil business is not a single and specific venture and hence the arrangement contended for by respondent could not be a joint adventure under the definitions thereof prevailing in Oklahoma.

(E) This is Not a Case in Which the Corporate Entity May be Disregarded

Corporations exist as entities apart from their stockholders. The oil properties in which respondent claimed an interest were all owned by petitioner corporations, not petitioner, Kasishke. Accordingly, for respondent to reach such properties he would have had to establish an agreement with the corporations creating such interest or the corporate entities of the petitioner corporations would have to be disregarded. Respondent sought to have the corporate entities of petitioners disregarded on the theory that petitioner Kasishke as the owner of the majority stock of the various corporations thereby controlled the corporations. The undisputed facts in the case are that Mrs. Kasishke,[6] wife of the petitioner, Kasishke, was the owner of 50% of the stock of petitioner corporations. In 1938, she was the owner of 2200 shares of stock, which according to petitioner represented 50% of the outstanding stock. The remaining stock, less qualifying shares, was owned by Mr. Kasishke. The record shows that Mrs. Kashishke participated in the affairs of the company as a director and as a stockholder. Respondent himself was an officer and director

[6] Mrs. Kasishke is not a party to this case.

of the petitioner corporations. Respondent actually prepared the minutes of petitioner corporations during the period in controversy. Such control as was exercised by petitioner Kasishke is insufficient to warrant disregard of the corporate entity. The present law on this point is clearly stated by the Supreme Court of Oklahoma in the latest case on this subject, *State, ex rel* v. *Tulsa Flower Exchange*, 135 P. (2d) 46, 47:

> "The word 'control' should be accorded its full and complete meaning, with due regard to the general purpose for which it was used in the statute. The statute in no way limits its meaning. The word as there used should be held to mean full power and authority to manage and direct every act, and to formulate every business policy, of the employment unit, without right of legal interference from anyone with respect to all lawful pursuits.
>
> The owner or owners of the majority of the capital stock of a corporation can never have direct control of the corporation merely by reason of such ownership. Direct control is always in the board of directors. 18 O. S. 1941, Sec. 104. The majority stockholders may name the board of directors and thereby exercise a more or less indirect control. The board of directors can never be composed of less than three stockholders. Sec. 104, supra. *Therefore, it is a legal impossibility for a single individual ever to acquire direct control of a corporation as a business entity.*
>
> This should be sufficient answer to every argument advanced by the state in this particular case. Tinger, by virtue of his majority stock, held certain powerful advantages, and may have exercised certain influences over the other stockholders that would border on something akin to indirect control, but he could never exercise direct control of the corporation by any 'legally enforceable means or otherwise.' Personal influence was the only instrument at his command in dealing with the board of directors concerning control of the corporation. It was said, however, in *Gaines* v. *Gaines*

Bros. Co., 176 Okl. 583, 56 P. (2d) 863, 868, that 'the law has always recognized the right of majority stockholders of a corporation to control its business and affairs.' No authority for the statement was cited. And the statement itself was unfortunate, for our statute, supra, provides otherwise. The majority may exercise indirect control by naming the directors who actually control the corporation." (Italics Supplied).

Thus, it is perfectly plain that the rule in Oklahoma is that it is a legal impossibility for a single individual, by stock ownership or personal persuasion, ever to acquire direct control of a corporation as a business entity. Moreover, respondent received all the benefits that flowed from the incorporation of the petitioner companies. Assuming the facts are as he charges, he has been relieved of all personal liability for corporate debts.[7] Further, he has acted as an officer and director of the various corporations for a period of years, kept the minutes, which minutes reflect in every year the payment of a specific salary to respondent, together with certain additional bonuses paid during certain early years when the profits were high. Having thus dealt with petitioner corporations, received salaries therefrom as an employee and officer of the corporation, respondent should be estopped to assert that the corporate entity no longer exists.[8] In disregarding the corporate entity for

[7] In fact, when respondent, shortly after he resigned, was sued for a corporate claim, he actually defended and escaped personal liability on the assertion that he had *no interest in petitioner corporations* (R. 75, 76, 80).

[8] As we point out in footnote 5 (supra) it is the established law of Oklahoma that co-adventurers are not permitted to carry on a joint adventure under a corporate organization or designation. *Sand Springs Home* v. *Dail*, 187 Okl. 431, 103 P. 524; *Commercial Lumber Co.* v. *Nelson*, 181 Okl. 122, 72 P. 2d 829; *Coryell* v. *Marrs*, 180 Okl. 394; 70 P. 2d 478; *Perry* v. *Morrison*, 118 Okl. 212, 247 P. 1004. This rule is not to be confused with the rule that corporations may be become joint adventurers with others.

the conveniences of respondent, the decisions of the courts below are in direct conflict with the *Tulsa Flower Co.* case.

(F) The Alleged Oral Contract Is Unenforceable Because of the Provisions of the Oklahoma Statute of Uses and Trusts and the Statute of Frauds

Respondent's theory requires, in order to reach the properties of the corporate petitioners, the enforcement of an oral express trust, the subject of which is an interest in real property. Thus because of such *express oral* contract the District Court held petitioner corporations to be trustees of respondent (R. 69).

The Supreme Court of Oklahoma has held that an oil and gas lease is an interest in real estate within the meaning of the Oklahoma statute controlling trusts and frauds.

Aikman v. *Evans*, 181 Okl. 94, 72 P. (2d) 479;
Harris v. *Tucker*, 147 Okl. 210, 296 Pac. 397;
Black v. *Wickett*, 146 Okl. 191, 293 Pac. 782.

Title 15, Section 136, of the Oklahoma Statutes of 1941 specifically provides that the following agreements are invalid unless in writing, and signed by the party or his agent:

> "An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein, * * *."

Title 60, Section 136 of the Oklahoma Statutes of 1941 provides that no trust in relation to real property is valid, unless created or declared "(1) By a written instrument subscribed by the grantor or by his agent thereto authorized by writing."

There is no contention in the present record that the trust sought to be declared by respondent Baker is either a resulting trust or a trust by operation of law. The respondent's theory is that there was an express agreement creating an

express trust under which the corporate petitioners held title to the oil producing properties in question for the benefit of respondent. The courts below have decreed a trust and have declared that respondent has a one-tenth interest in the titles to the leases (R. 69). To reach such a conclusion, it is necessary to completely ignore the provisions of the Oklahoma statutes prescribing how trusts in real estate shall be created and the Oklahoma decisions construing those statutes. The Supreme Court of Oklahoma has held that an oral agreement which attempts to create an *express* trust, the subject of which is an interest in real property, is unenforceable.

Reed v. *Peck & Hills Furniture Co.*, 93 Okl. 212, 220 Pac. 900;
McCoy v. *McCoy*, 30 Okl. 379, 121 Pac. 176;
Hazlett v. *Keapse*, 171 Okl. 82, 42 Pac. (2d) 124;
Bryant v. *Mahan*, 130 Okl. 67, 264 Pac. 811;
Abramah, et al. v. *McSoud, et al.*, 109 P. (2d) 822;
Cardiff v. *Spradling*, 140 P. (2d) 920;
Oliphant v. *Rogers*, 95 P. (2d) 887.

If it be urged that the oral agreement contended for by respondent does not constitute an attempt to create an oral express trust, nevertheless, under respondent's theory he was to receive a one-tenth interest in the leases in consideration for certain services. Such a contract has been squarely held by the Supreme Court of Oklahoma to be violative of the statute of frauds and unenforceable. Thus, in the case of *Hall* v. *Haer*, 160 Okl. 118, 16 P. (2d) 83, 84, the Supreme Court of Oklahoma held that an oral agreement by the owner of land to convey an undivided one-half interest in the minerals therein to another person, *in consideration of services to be rendered*, is within the statute of frauds and unenforceable. The Supreme Court further held that the mere performance of the services under such parole agree-

ment is not sufficient to take it out of the statute. In the *Hall* case, as here, the plaintiff contended that his agreement created a joint venture or mining partnership and, therefore, the case did not come within the statute of frauds. In ruling adversely to such contention, the Supreme Court of Oklahoma held (p. 84):

> "Plaintiff urges that the agreement merely constitutes a joint adventure or a mining partnership. This contention cannot be sustained. We think the facts in the instant case bring it within the rule announced in *Bahnsen* v. *Walker*, 89 Okl. 143, 214 P. 832. It is there said: 'An oral contract made between B. and W., by which the latter agreed to use his influence to induce a third person to convey a tract of land to B., in consideration of which B. agreed to reconvey 20 acres of said tract to W., is not specifically enforceable in a suit in equity by W., upon the theory that the transaction was a joint adventure and the contract created a trust relation between B. and W.'
>
> In that case plaintiff was employed by defendant to use his influence to induce a third person to convey a tract of land to defendant, and, in consideration of such service, defendant agreed to convey to plaintiff 20 acres of the land. It was there contended, as in the instant case, that the transaction was a joint adventure, and not an oral agreement to convey an interest in the land. In disposing of this contention, the court said: 'We are unable to perceive any of the elements of a joint adventure or a trust relation in the transaction established by the foregoing uncontradicted evidence. It seems quite clear to us that at most the relation created by the contract was that of debtor and creditor, and that the refusal of the defendant to convey the land merely made the plaintiff his creditor.'
>
> In the instant case, defendants were the owners in fee of the land. They employed plaintiff to perform certain services for them and in consideration thereof agreed to give him an interest in the well and to convey to him an interest in the minerals. This case, insofar

> as it relates to an interest in the minerals lying in and under the land, under the above authority, is an agreement to convey an interest in the land, and cannot be construed as a joint adventure."

It is submitted that the decisions below conflict with the decisions cited in this section of our Petition.

(G) Respondent Having Abandoned and Renounced the Alleged Joint Adventure May Not under the Statutes of Oklahoma Recover Profits Earned by the Enterprise Subsequent Thereto.

Respondent Baker testified that he voluntarily resigned from the arrangement he had with Kasishke on June 5, 1939. In fact, he wrote a written letter of resignation (R. 33). The District Court found that Baker, by his act of resignation, terminated the alleged joint adventure (R. 70). The District Court also found that the leases were not paid out on that date (R. 70). Notwithstanding this situation, the District Court entered a judgment compelling the execution of assignments of a one-tenth interest, and also found that respondent was entitled to share in one-tenth of the profits of the venture for all time to come (R. 84). And this irrespective of the fact that no accounting has been had to determine if the leases have paid out and earned profits. Baker keeps his interest even though an accounting might show no profits from the business.

Under Oklahoma law, a joint adventure is governed by the law of partnerships and is in fact a partnership. Thus, in *Boles* v. *Aker*, 116 Okl. 266, 244 Pac. 182, 184, the Supreme Court of Oklahoma held (p. 184):

> "A joint adventure is governed by the same rules as partnerships, and in fact, is a partnership."

Thus, the law of Oklahoma is that when it is established that joint venture has been entered into, the law of partnerships applies.

Commercial Lumber Co. v. *Nelson,* 181 Okl. 122, 72 P. (2d) 829, 830.

In the *Commercial Lumber Co.* case, the Supreme Court of Oklahoma held (p. 830):

> "When it is established that a joint adventure has been entered into, then the law of partnership applies between the parties and third persons."

Section 8116, Compiled Statutes, 1921, of Oklahoma, provides:

> "After a partner has given notice of his renunciation of the partnership, he cannot claim any of its subsequent profits and his co-partner may proceed to dissolve the partnership."

This statute bars the right of respondent to recover for profits arising subsequent to his resignation on June 5, 1939. Thus in *Curtin* v. *Moroney,* 117 Okl. 276, 246 Pac. 232, 235 the Supreme Court of Oklahoma construed the provisions of Section 8116 of the Compiled Statutes and held (p. 235):

> "The court, applying the law to these facts, held that plaintiff was not entitled to any profits made after he withdrew from the partnership. Plaintiff contends that this was an error, and calls our attention to the rule stated in *Durbin* v. *Barber,* 14 Ohio 311, Bates on Partnership, Vol. 11, Sec. 794, p. 842, and 30 Cyc., p. 688, to the effect that, if a court of equity fix upon the time at which a partnership shall be considered as having determined, and it appear that the capital of one partner was subsequently employed by another, who continued to carry on the business, the former is entitled to such proportion of the profits as his capital thus retained bears to the whole capital. We think this is the general rule, and, in the absence of any statutory provisions to the contrary, is supported by the great

weight of authority, *but the rule is not applicable to the facts of the case at bar in this state because we have a statute to the contrary.* Section 8116, Compiled Statutes 1921, provides:

> 'After a partner has given notice of his renunciation of the partnership, he cannot claim any of its subsequent profits, and his copartners may proceed to dissolve the partnership.'

This statute settles the question involved against plaintiff's contention, and we must therefore hold that plaintiff was not entitled to judgment for profits under the facts as above stated." (Italics supplied.)

It seems perfectly plain that the provisions of the judgment entered below awarding respondent a one-tenth interest in properties of petitioner corporations and in awarding him one-tenth of the profits of the venture for all time to come squarely conflict with Section 8116 of the Compiled Statutes of Oklahoma and with the *Curtin* case.

II

The Decisions Below Are in Conflict With the Applicable Decisions of This Court

In *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, this Court overruled the ancient rule of *Swift* v. *Tyson*, 16 Pet. 1, and held that henceforth in all cases arising under state law, the law to be applied is the law of the state, and it makes no difference whether the law of the state shall be declared by its legislature in a state or by its highest court in a decision. This Court went further and declared that there is no Federal general common law and the federal courts have no power to declare substantive rules of common law applicable in a State whether they be local in their nature or general. In the instant case, we have demonstrated that the decisions below have refused to follow the law of Okla-

homa as declared in its statutes and by the decisions of its highest court.

In such a situation, it is plain that the decisions below conflict with the rule announced by this Court in the *Erie R. Co.* case and the numerous cases following it which have since been decided by this Court.[9]

In affirming the judgment of the District Court, the Court of Appeals below has therefore sanctioned such a departure from the usual course of judicial proceedings as now controlled by the *Erie R. Co.* case as to call for the exercise of this Court's powers of supervision and correction in the public interest.

It is also important to point out that the judgment below actually decrees specific performance of the alleged partnership contract here involved. It makes respondent a partner, with a one-tenth interest, with petitioners for all time to come. Specific performance of a partnership agreement of the character here found will not lie because partnerships not limited in term are terminable at will and involve personal services. This rule is of universal application, as this Court held in *Karrick* v. *Hannaman*, 168 U. S. 328, 333, 334, 336. While the courts below cite the *Karrick* case, their decisions permitting specific performance here conflict with that case.

While the manifest injustice visited upon petitioners by the judgment below might not cause this Court to grant Certiorari, as the decisions below squarely conflict with the controlling statutes and decisions of the State of Oklahoma, and the applicable decisions of this Court, it is against the public interest to permit those decisions to stand, as they will cause untold confusion and hardships and

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[9] Such as: *Meredith* v. *Winter Haven*, 320 U. S. 228, 237; *Palmer* v. *Hoffman*, 318 U. S. 109, 117; *Klaxton Co.* v. *Stentor Co.*, 313 U. S. 487, 496; *Griffin* v. *McCoach*, 313 U. S. 498, 503; *Fashion Guild* v. *Trade Comm'n.*, 312 U. S. 457, 468.

will be the incentive for a flood of litigation, particularly in the federal courts, by employees seeking to establish joint adventures through oral promises which do not comply with the established law of Oklahoma. As such suits could not be maintained in the Oklahoma courts because of the statutes and decisions noted, it is against the public interest to permit them to be maintained in the federal courts through a relaxation of the strict state rules controlling such adventures.

Conclusion.

It is respectfully submitted that this Petition for Certiorari to bring before this Court the decision and judgment of the United States Circuit Court of Appeals for the Tenth Circuit should be granted.

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